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Alvin E. Evans

University of Kentucky

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CONCERTED WILLS—A POSSIBLE DEVICE FOR AVOIDING THE WIDOW'S PRIVILEGE OF RENUNCIATION

ALVIN E. EVANS*

It is no surprising thing that two persons whose lives have closely traveled the same path for many years should consult together regarding the disposition of their individual property after their respective deaths. There may be the motive of providing each for the other, or even a bargaining whereby each also has a weather eye on his own prospects. Since there are so many motives, arrangements and idiosyncrasies possible with respect to the wills or will which they may produce, no single term, so far, has successfully described these instruments.¹

The writer of this paper has more or less arbitrarily omitted a general treatment of contracts to make wills and has devoted himself to a discussion of joint or mutual wills as such. Several reasons may be suggested for this: (a) Contracts to make a will do not necessarily and usually do not involve more than the will of one person and they have been rather adequately dealt with elsewhere. (b) In the case of joint and mutual wills, the terms are contained within the wills if they are reduced to writing at all.² (c) Where the contract is found in the will or wills, the consideration given each testator for his will is the execution by the other of his will. This is not the case where simply a con-

* Dean, University of Kentucky Law School.

¹ See 2 A. L. R. 1193; id. 3-172; 33 id. 739; 43 id. 1020; 57 id. 607; 60 id. 627; 102 id. 485; an excellent article by Professor Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing* (1930) 15 CORN. L. Q. 358; Note (1935) 29 ILL. L. REV. 1090. As to the policy involved, see Partridge, *Revocability of Mutual Wills* (1929) 77 U. OF PA. L. REV. 357.

² See *Price v. Aylor*, 258 Ky. 1, 79 S. W. (2d) 350 (1935). (This case holds the joint will of husband and wife is valid as a contract and so is binding on a second wife, the surviving husband having remarried); *Underwood v. Myer*, 107 W. Va. 57, 146 S. E. 696 (1929); Note (1926) 39 HARV. L. REV. 663.

tract is made to execute a will which is to contain certain defined provisions. Thus, very many contracts to make a will are made by the promisor in consideration of service or support. Perhaps also (d) in the contract cases an immediate interest is given the promisee in the property of the promisor, so that the will is not revocable, whereas in many joint will cases the will is truly ambulatory. (e) It would appear generally that a statute revoking all wills made prior to the marriage of the testator would be applicable only to ambulatory wills. (f) Though a will may have been made in pursuance of a contract, which contract was entered into before marriage (to devise according to a named plan), yet the will may be made at a later date and after the occurrence of certain events. These events may raise an issue as to the desirability of the performance of the contract.³ (g) In all cases of joint wills the execution is the simultaneous act of both testators. In practically all and perhaps all cases of mutual wills the execution by each actor is part of a single transaction.⁴ This need not be and often is not true respecting the making of a will in carrying out a contract.

1. THE TERMS USED

The fact that the wills of two or more persons are similar or even identical *mutatis mutandis* is not necessarily proof and in the opinion of this writer is no proof that they were made under the influence of a contract or even of an understanding, though the case is likely to be rare where the wills point toward a common object and the testators have not discussed the matter with each other.⁵ Though it is most natural that a husband and a wife should each give his or her all to the other, and there need be no concert, yet in so important a matter they will usually seek the advice of each other or find out how the wind blows.

³ See *Wides v. Wides*, — Ky. —, — S. W. (2d) — (1945); *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998 (1910); *Arland's Estate*, 131 Wash. 297, 230 Pac. 157 (1924) (Deed of community property made by each spouse and placed in escrow, to be delivered at death, the survivor to leave the future property to their children. Husband remarried). See also *Skinner v. Rasche*, 165 Ky. 108, 176 S. W. 942 (1915); 69 A. L. R. 14; 106 A. L. R. 742.

⁴ See Notes 58 and 59, *infra*.

⁵ *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934); *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199 (1891); *Wanger v. Marr*, 257 Mo. 482, 165 S. W. 1027 (1914).

There is still no contract and each is free to revoke. The separate wills, in a sense, may be reciprocal, but this fact does not necessarily imply some agreement for advantage. It is only where there is a bargain whereby two or more persons, by previous agreement, make their several wills, each in consideration of the other, that an obligation arises which prevents free revocation.⁶ The consideration contemplated may be a promised benefit to the other testator or to some third person whom that testator desires to provide for or to both. Thus, two or more wills may be reciprocal and still revocable.⁷ Each testator provides for the other. Often, however, courts have held that this reciprocal element is itself sufficient evidence of a contract, even though these provisions would naturally be made without any agreement.⁸

The term "mutual" is used in the cases with any one of four or more connotations: (a) The testators have conferred with each other and thereafter executed wills or a will which was influenced by that conference. (b) "Mutual" may be used with the additional connotation of a reciprocal character to the effect that each executor receives some benefit from the will of the other. (c) It is also used with the further significance that the parties have bargained with each other and provisions in the will of one are made in consideration of dispositions in the will of the other. The same idea of mutuality is occasionally found in other contract cases, that is, it is the equivalent of consideration.⁹ Again (d), as in the doctrine of mutuality of remedy, "mutual" may mean that one is not bound unless the other is also bound. While the word "mutual" is sometimes used in a contractual sense,¹⁰ yet all that should fairly be in-

⁶ *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319 (1928); *Howells v. Martin*, 101 N. J. Eq. 275, 137 Atl. 565 (1927); re *Rosenblath's Estate*, 263 N. Y. S. 303 (Sur. 1933); *Flower v. Flower*, 166 N. E. 914 (Ohio App. 1928); *Holman v. Lutz*, 132 Ore. 185, 282 Pac. 241 (1929); *Williams v. Williams*, 123 Va. 643, 96 So. 749 (1918).

⁷ *Klussman v. Wessling*, 238 Ill. 568, 87 N. E. 544 (1909).

⁸ *Chambers v. Porter*, 183 N. W. 431 (Iowa, 1921); *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918); re *Weir's Will*, 134 Wash. 560, 236 Pac. 285 (1925)—not reciprocal; *Underwood v. Myer*, 107 W. Va. 57, 146 S. E. 696 (1929) (The only evidence of contract was the fact that the instrument was the joint will of husband and wife); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763 (1924).

⁹ See *Williams v. Williams*, 123 Va. 643, 96 So. 749 (1918); 1 WILLISTON, CONTRACTS (Rev. Ed. 1937) sec. 103E.

¹⁰ Re *Johnson's Estate*. — Iowa —, 10 N. W. (2d) 664 (1943);

ferrable from the term "mutual" is that the instruments were made as a result of some understanding between the testators. That understanding need by no means be contractual in nature.¹¹

Since the term "mutual" so often means that the instruments are made after the parties have advised with each other, a better term is needed. Neither "mutual" nor "reciprocal" has a clear connotation. The word "concerted" readily covers all situations, contractual as well as those merely mutual and reciprocal. It implies nothing as to the issue of the freedom of the testator to revoke. Therefore, wills that chance to be alike *mutatis mutandis* but executed without prior discussion of the matter would not be concerted wills.

Joint wills cannot well be other than concerted wills. No two persons would conceivably execute the same instrument without some understanding prior to the act of execution.¹² They are, of course, always mutual in that they have some reference, explicit or implicit, to each other, as in (a) above,¹³ but they may or may not be reciprocal, and there may or may not be in them evidence of a bargaining.¹⁴ They may take the form of a deed and are to be construed as wills because the effect (perhaps unknown to their authors) is to pass title only after death. If they are not contractual, there is no impediment to revocation any more than in the case where there are two wills. Whether contractual wills are also revocable is considered subsequently. A joint will may be the identical language of two persons, written once,¹⁵ or it may be the equivalent of two sepa-

Child v. Smith, 225 Iowa 1205, 282 N. W. 316 (1938); Chambers v. Porter, 183 N. W. 431 (Iowa, 1921); Carle v. Miles, 89 Kan. 540, 132 Pac. 146 (1913); Will of Diez, 50 N. Y. 88 (1872); Wagnon v. Wagnon, 16 S. W. (2d) 366 (Tex. Civ. App. 1929); re Weir's Will, 134 Wash. 560, 236 Pac. 285 (1925); Estate of Heys (1914) P. 192.

¹¹ American Trust Co. v. Eckhardt, 331 Ill. 261, 162 N. E. 843 (1928).

¹² See Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56 (1915).

¹³ Ginn v. Edmundson, 173 N. C. 85, 91 S. E. 696 (1917); Williams v. Williams, 123 Va. 643, 96 So. 749 (1918); Note (1928) 14 CORN. L. Q. 108.

¹⁴ Frontier Lodge v. Wilson, 139 Kan. 75, 30 P. (2d) 307 (1934); Phillips v. Murphy, 186 Ky. 763, 218 S. W. 250 (1920); re Cawley's Estate, 136 Pa. 628, 20 Atl. 567 (1890). It is difficult to find a bargaining in Price v. Aylor, 258 Ky. 1, 79 S. W. (2d) 350 (1935) and in Rastetter v. Hoenninger, 214 N. Y. 66, 108 N. E. 210 (1915).

¹⁵ e.g., Hill v. Harding, 92 Ky. 76, 17 S. W. 199 (1891); Price v.

rate wills, the terms of each being individually stated in one instrument, frequently in identical terms.¹⁶

In *Murphy v. Black*¹⁷ the spouses each executed simultaneously a reciprocal, separate will, devising the whole of the testator's property to the other in fee, as the pleading seems to show. One hour later they executed a joint will by which (as alleged) they left the entire property, whether of the one or of the other (there being no co-ownership) to defendants. The husband was the survivor and this action was brought by him to quiet title against defendants, who claimed under the joint will. The court decided that under the two separate wills the intent was to leave to the survivor a life estate. This conclusion was drawn from the fact that they also executed each a separate will. It is not readily seen how this follows from the premises. Prior to the death of the husband, the joint will could not have been probated as his will. There being no other evidence of a contract, it was premature to decide that the joint will bound the survivor. In another case¹⁸ the court found that although there was a binding contract between the spouses to the effect that their joint will should leave the property to their son, after the death of the survivor, yet, on the death of the mother, the son had no vested interest which would pass to his trustee in bankruptcy. This result seems unjustifiable.

It is sometimes said that a joint will is to be regarded as irrevocable where if the same provisions were made in separate wills they would not be.¹⁹ It will be later shown that this view is not well taken.

In the early cases the courts were much troubled with joint wills. How could the act of two parties express the individual will of each? Could such a will be probated twice? Could a will which must always be ambulatory be revoked, when joint,

Aylor, 258 Ky. 1, 79 S. W. (2d) 350 (1935); re Raupp's Will, 31 N. Y. S. 680 (Sur. 1894).

¹⁶ *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); re *Cawley's Estate*, 136 Pa. 628, 20 Atl. 567 (1890); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763 (1924).

¹⁷ 44 Iowa 176 (1876). See *Seat v. Seat*, 172 Tenn. 618, 113 S. W. (2d) 751 (1938).

¹⁸ In *re Lage*, 19 F. (2d) 153 (D. C. Iowa, 1927).

¹⁹ *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210 (1915); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898); *Burress v. Blair*, 61 Mo. 133 (1875).

by the act of one of the parties? It was said not to be the will of either alone because it did not purport to be.²⁰

A further difficulty has arisen in those few cases where the joint will provides that it shall have no effect until after the death of the survivor. One solution, taken in Connecticut,²¹ was that the will was impractical and must fail. Another was that no effect could be given to it until the death of the survivor, in which event presumably it is to be probated²² as the will of each. Another is to probate it on the death of the first to die in spite of that provision.²³ The last solution seems preferable.

2. THE PROPERTY INVOLVED

It is assumed here that the term "joint will" means an instrument executed by two or more parties and that it is joint because they acted together. It has been asserted, however, that a joint will is one where the testators dispose of joint property; that unless the property is owned together by some form of co-ownership, the will is mutual but not joint.²⁴ That use of the term shifts the application from the act of the parties to their property and it is apparently quite too restrictive to assume that there must always be joint property where there is a joint will.

If it were true that a will by co-owners is the only case where a joint will can exist, there would be far fewer of them. However, there are cases where the character of the property devised has appeared in the evidence and has, to some extent, been a factor. It would seem to be a not unusual thing for co-owners being associated thus in their property interests to make a common disposition rather than for them to act quite independently of each other. Thus, cases of husband and wife who

²⁰ *Hershy v. Clark*, 35 Ark. 17 (1879), discussed in detail in Drake, *The Public Policy of Contracts to Will Future Acquired Property* (1909) 7 MICH. L. REV. 318, at 326-329; *Clayton v. Liverman*, 19 N. C. (2 D. & B.) 558 (1837); *Walker v. Walker*, 14 Ohio St. 157 (1862); *Hobson v. Blackburn*, 1 Add. 274, 162 E. R. 96 (Eccl. 1822).

²¹ *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255 (1896).

²² *Epperson v. White*, 156 Tenn. 155, 299 S. W. 812 (1927); *Hofert's Estate*, 65 Pa. Sup. 515 (1917).

²³ *Graham v. Graham*, 297 Mo. 290, 249 S. W. 37 (1923); *Seat v. Seat*, 172 Tenn. 618, 113 S. W. (2d) 751 (1938); *Goods of Piazzis-Smyth* (1898) P. 7.

²⁴ *Desmeumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703 (1909); *Everdell v. Hill*, 58 N. Y. S. 447 (Misc. 1899). See Note (1907) 20 HARV. L. REV. 315.

chance to be tenants by the entirety,²⁵ as also other persons who may be tenants in common,²⁶ joint tenants,²⁷ or tenants in partnership²⁸ appear not infrequently. Some of them affect community property.²⁹ From the standpoint of the validity of the will, however, where the parties are bargaining, it is more important that both have property to pass under it than that they have a co-ownership interest in it.³⁰ Where the parties are strangers and have no common property interests, as, for example, where neighbors owning adjoining lots agree each to devise his lot to the other, it is less likely that the court will find that the wills resulted from a bargain.³¹

In *Gorman v. Gause*³² a man and woman in a community property state made an antenuptial agreement to the effect that any property acquired by either after marriage should be the separate property of the acquirer. This agreement was fol-

²⁵ *Ginn v. Edmundson*, 173 N. C. 85, 91 S. E. 696 (1917). In *Towle v. Wood*, 60 N. H. 434 (1881) husband and wife each had a bank account and each desired to leave his account to the other. They executed a conveyance each to the other, not to be operative until death and not attested. In *Popejoy v. Peters*, 173 Tenn. 484, 121 S. W. (2d) 538 (1938) property went to wife as survivor and not under the joint will. It was levied on and sold at suit of creditors after death of husband, for debts of wife.

²⁶ *Minor v. Minor*, 15 Ohio Dec. 264 (1904); *Betts v. Harper*, 39 Ohio St. 639 (1884).

²⁷ *Hershy v. Clark*, 35 Ark. 17 (1879); *Tate v. Emery*, 139 Ore. 214, 9 P. (2d) 136 (1932); *Schram v. Burkhart*, 137 Ore. 208, 2 P. (2d) 14 (1931). In the case of *re Raupp's Will*, 31 N. Y. S. 680 (Sur. 1894) the nature of the ownership is not disclosed, as also it is not in *Price v. Aylor*, 258 Ky. 1, 79 S. W. (2d) 350 (1935).

²⁸ *Buehrle v. Buehrle*, 291 Ill. 589, 126 N. E. 539 (1920); *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Herman v. Ludwig*, 174 N. Y. S. 469 (App. D. 1919), *affd.* 229 N. Y. 544, 129 N. E. 908 (1920); *Watson's Estate*, 213 N. C. 309, 195 S. E. 772 (1938); *Goods of Raine*, 1 Sw. & Tr. 144 (Eccl. 1858).

²⁹ *Estate of Anderson*, 16 Ariz. 185, 141 Pac. 723 (1914); *Rolls v. Allen*, 204 Cal. 604, 269 Pac. 450 (1928); *Estate of Rolls*, 193 Cal. 594, 226 Pac. 608 (1924); *Belkin v. Ray*, 176 S. W. (2d) 162 (Tex., 1944) (The court found husband and wife to be both owners of community property and joint tenants of other property, the wife having conveyed her separate estate to a third person who reconveyed to husband and wife); *Prince v. Prince*, 34 Wash. 552, 117 Pac. 255 (1911); *Dennyssen v. Mostert*, 8 Moo. 502, 526, 17 E. R. 400 (P. C. 1872). Cf. *Arland's Estate*, 131 Wash. 297, 230 Pac. 157 (1924).

³⁰ *Re Johnson's Estate*, — Iowa —, 10 N. W. (2d) 664 (1943). See *Moore v. Samuelson*, 107 Kan. 744, 193 Pac. 369 (1920); *Allen v. Allen*, 28 Kan. 14 (1882); in *re Rogers*, 11 Me. 303 (1881); *re Hansen's Estate*, 87 Neb. 567, 127 N. W. 879 (1910); and *Kunnen v. Zurline*, 2 Cin. Sup. Ct. R. 440 (1873).

³¹ *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925).

³² 56 S. W. (2d) 855 (Tex. Com. of App. 1933).

lowed by mutual wills each reciting that the other should have the property standing in his or her own name and nothing more. The balance was given by each to his legal heirs. It was held that the agreement was void as it sought to set at naught the laws of the state affecting community property. The decision seems to be wrong. There was nothing illegal about the mutual wills,³³ and the survivor, having accepted the benefits of the will of the one first to die, should be estopped to deny the validity of the agreement.³⁴

3. THE EFFECT OF SUBSEQUENT MARRIAGE, RENUNCIATION AND OTHER STATUTORY PROVISIONS

Concerted wills may be required to run the gamut of various statutory provisions which were not enacted with this type of will specifically in view. Thus, the common provision that wills shall be revoked by subsequent marriage has been invoked to avoid a concerted will. It seems inevitable, however, that if a contract based upon adequate consideration is sufficient in effect to make a will irrevocable, that result will arise, even though there may have been a subsequent marriage.³⁵ The statute applies to ambulatory wills only.

A woman who marries a spouse after the latter has so bound himself by contract undertakes the marriage constrained by all obligations then existing.³⁶ No legislative purpose has been discovered by the courts which should avoid in this way existing rights and duties. On the other hand, wills are commonly revocable and if the testator in a concerted will did not bind himself in such a way as to limit his power of revocation,

³³ *Gorman v. Gause*, 56 S. W. (2d) 855 (Tex. Com. of App. 1933).

³⁴ *Martin v. Helms*, 319 Ill. 281, 149 N. E. 770 (1925); *Price v. Aylor*, 258 Ky. 1, 79 S. W. (2d) 350 (1935); *Coghlin v. Coghlin*, 26 Ohio C. C. 18 (1904); *Burkhart v. Rogers*, 134 Okla. 219, 273 Pac. 246 (1928).

³⁵ *Estate of Anderson*, 16 Ariz. 185, 141 Pac. 723 (1914); *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998 (1910); *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919); *Price v. Aylor*, 258 Ky. 1, 79 S. W. (2d) 350 (1935); *Desmeumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703 (1909); *Larrabee v. Porter*, 166 S. W. 395 (Tex. Civ. App. 1914); *Underwood v. Myer*, 107 W. Va. 57, 146 S. E. 696 (1929).

³⁶ At least this seems true where joint or mutual wills are involved. As to contracts for a will, see *Wides v. Wides*, — Ky. —, — S. W. (2d) — (1945).

his later marriage will have a revocatory effect under the statute.³⁷

*Buehrle v. Buehrle*³⁸ illustrates the effect of a renunciation by the widow of the benefits arising under a contractual will between the husband and another person. Two brothers, business partners, contracted that the survivor should receive, under the will of the other, the latter's share in the partnership property. The consideration therefor was that at the death of the first to die, his widow should receive the proceeds of a life insurance policy, the premiums upon which were to be paid by the partnership. On the death of the plaintiff's husband, the plaintiff renounced the will and claimed her statutory share in her husband's property. Though the will was clearly contractual in character (the contract having been entered into in writing following which mutual wills were executed), it was held that renunciation avoided the will. The court observed that: "The public policy of this state declared by statute is that a husband cannot by will deprive his widow of her rights in his estate." "... the interest of the deceased brother in the wholesale liquor business is the property of his estate." This decision does not conflict, however, with the principle of the marriage cases and seems to be sound because the wife was not a party to the contract. In at least two cases the wife, as *survivor*, has effectively renounced the benefits under the husband's will. In one it was held that she was not bound where she accepted nothing under it³⁹ and in the other the evidence of a bargain was insufficient.⁴⁰ But if the wife has validly bargained for benefits under the husband's will, she cannot renounce. The unwary must observe that in the *Buehrle Case* above the bargaining was not between husband and renouncing wife. A wife may well renounce, even in the case of concerted

³⁷ *Peoria Humane Soc. v. McMurtrie*, 229 Ill. 579, 82 N. E. 319 (1907) (Mother and son made joint will—son later married); *Watson's Estate*, 213 N. C. 309, 195 S. E. 772 (1938) (Three brothers made contractual concerted wills but on subsequent marriage of one, released each other from the contract. One did not thereafter revoke his will; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739 (1894); *Re Oldham* (1925) Ch. 75; *Cf. Arland's Estate*, 131 Wash. 297, 230 Pac. 157 (1924) (second wife takes under the Statute of Descent and Distribution).

³⁸ 291 Ill. 589, 126 N. E. 539 (1920).

³⁹ *Re Rhodes Estate*, 277 Pa. 450, 121 Atl. 327 (1923).

⁴⁰ *Rice v. Winchell*, 385 Ill. 36, 120 N. E. 572 (1918).

wills, if there was no contract between the spouses. In such case no estoppel could arise even from the acceptance of benefits.

In *Burkhart v. Rogers*,⁴¹ husband and wife made a joint will giving all to the survivor but making provision for other beneficiaries in the event of their simultaneous death. The husband had a daughter by a previous marriage who was not mentioned in the will. It was held that the statutory rights of a pretermitted child as a forced heir could be exercised in spite of the contractual character of the will. Here again the result is not in conflict with but rather supports the principle of the marriage cases inasmuch as the birth of the daughter ante-dated the will and the marriage.

4. REPUDIATION DURING THE LIFE-TIME OF BOTH TESTATORS

A peculiar attitude has sometimes been assumed toward agreements for concerted wills. Although they are looked upon as contractual, yet it is frequently held that one of the testators may repudiate his will after *notice* to the other party. The first English case in which this view was taken (which was said to be a novelty) is *Dufour v. Perira*.⁴² American courts took up this doctrine of notice, apparently regarding the survivor as estopped not simply because of benefits received under the will of the first to die, but also because it was then too late, after a secret repudiation, for the former to make other plans.⁴³ Though not until death without notice of repudiation does the will become irrevocable,⁴⁴ yet it is not freely revocable. So where the survivor had notice of the repudiation by the first

⁴¹ 134 Okla. 219, 273 Pac. 246 (1928).

⁴² 1 Dick. 419, 21 E. R. 332 (Ch. 1769). See also *Walpole v. Orford*, 3 Ves. Jr. 402, 30 E. R. 1076 (1797) and *Denysen v. Mostert*, 8 Moo. 502, 526, 17 E. R. 400 (P. C. 1872). The Roman-Dutch law did not permit the survivor to withdraw.

⁴³ *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934); see *Buehrle v. Buehrle*, 291 Ill. 589, 126 N. E. 539 (1920); *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216 (1909); *Maurer v. Johansson*, 223 Iowa 1102, 274 N. W. 99 (1937); *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042 (1917); *Wright v. Wright*, 215 Ky. 394, 285 S. W. 188 (1926), and see *Herman v. Ludwig*, 174 N. Y. S. 469 (App. D. 1919), *affd.*, 229 N. Y. 544, 129 N. E. 908 (1920); *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185 (1912); *Minor v. Minor*, 15 Ohio Dec. 264 (1904); *Canada v. Ihmsen*, 33 Wyo. 439, 240 Pac. 927 (1925).

⁴⁴ *Wallace v. Wallace*, 216 N. Y. 28, 109 N. E. 872 (1915); see *Ex Parte Day*, 1 Brad. 476 (N. Y. Surr. 1851); *Minor v. Minor*, 15 Ohio Dec. 264 (1904).

to die, he could have changed his own will, but after death of the latter, it becomes then too late for the survivor to revoke.⁴⁵ Where, however, the Statute of Frauds stands in the way, the presence or absence of notice of repudiation during the lifetime of both cannot usually be important.⁴⁶

As intimated above, stress is laid by other courts not simply, or even at all, on notice, but rather on the receipt of benefits by the survivor. This fact supposedly creates an estoppel,⁴⁷ and there would be no estoppel on the survivor if he should not have the will of the first to die probated⁴⁸ and should make no claim under it. Nor is there an estoppel where the joint maker first to die owned only an inconsiderable property. So also where the power to revoke is reserved, there could be no estoppel.⁴⁹ Thus, there would be the continuing possibility of revocation with notice, that is to say, a secret repudiation is misleading and so fraudulent and the new beneficiaries are bound by an estoppel fastened upon the repudiating testator whereby the revocation is denied effect. On the other side the survivor may repudiate his own concerted will if he makes no claim and takes no benefit under the will of the first to die. It must be admitted that such a theory creates an embarrassment. Is the will of the first to die to be considered revoked by some method not provided by statute and by some person other than the testator?

If one of the testators had no property, can the joint will of the two or the concerted wills of both bind them? In *Estate of Hansen*⁵⁰ the joint will of husband and wife was held to be

⁴⁵ *Lally v. Cronen*, 247 N. Y. 58, 159 N. E. 723 (1928).

⁴⁶ *Gibson v. Crawford*, 247 Ky. 228, 56 S. W. (2d) 985 (1932); *Gould v. Mansfield*, 103 Mass. 408 (1869); *Wanger v. Marr*, 257 Mo. 482, 165 S. W. 1027 (1914).

⁴⁷ *Child v. Smith*, 225 Iowa 1205, 282 N. W. 316 (1938); *Meador v. Manlove*, 97 Kan. 706, 156 Pac. 731 (1916); *Mosloski v. Gamble*, 191 Minn. 170, 253 N. W. 378 (1934); *Bower v. Daniel*, 198 Mo. 289, 95 S. W. 347 (1906); *Schramm v. Burkhart*, 137 Ore. 185, 282 Pac. 241 (1931); *French v. French*, 148 S. W. (2d) 930 (Tex. Civ. App. 1940); *Sherman v. Goodson's Heirs*, 219 S. W. 839 (Tex. Civ. App. 1920); *Moore v. Moore*, 198 S. W. 659 (Tex. Civ. App. 1917); *Wilson v. Starbuck*, 116 W. Va. 554, 182 S. E. 539 (1935); *Stone v. Hoskins* (1905) P. 194.

⁴⁸ *re Rhodes Estate*, 277 Pa. 450, 121 Atl. 327 (1923); *Hoffert's Estate*, 65 Pa. Sup. 515 (1917) (revocable).

⁴⁹ *Zabel v. Stewart*, 153 Kan. 272, 109 P. (2d) 177 (1941).

⁵⁰ 87 Neb. 567, 127 N. W. 879 (1910). Cf. *Re Johnson's Estate*, — Iowa —, 10 N. W. (2d) 664 (1943); *Moore v. Samuelson*, 107 Kan. 744, 193 Pac. 369 (1920); *Rogers, Appellants*, 11 Me. 303 (1834).

his will only inasmuch as he alone had property. In another case the wife's property was valued at \$50, while the husband's property passing under the will amounted to \$29,000. This disparity was sufficient to enable the surviving husband to revoke,⁵¹ there being no adequate consideration for a contract. To some extent this holding might be regarded as supporting the view that there can be no joint will unless there is co-ownership of property. This is not, however, the conclusion that should be reached. The explanation is that such contractual will will not be enforced equitably unless there was an adequate consideration. Sometimes also a spouse joins in the will of the other as a matter of form.⁵² We may therefore fairly deduce that there is no contractual feature preventing revocation where the only purpose of the testators is to give each his property to the other, as also where the property passing under the will of one is so inconsiderable as to make it unreasonable to find a contractual intent.⁵³ The lack of reciprocal provisions is likely to be a basis for finding no contract, but not necessarily so.⁵⁴ The will is likewise revocable if it was not contractual, though it looked toward benefitting third persons as well as or rather than either of the testators.⁵⁵

The wills may be exact duplicates *mutatis mutandis*,⁵⁶ or they may differ from each other in particulars important or unimportant.⁵⁷ It seems to make no difference, providing

⁵¹ *Re Johnson's Estate*, — Iowa —, 10 N. W. (2d) 664 (1943).

⁵² *Allen v. Allen*, 28 Kan. 14 (1882).

⁵³ *Lewis v. Scofield*, 26 Conn. 452 (1857); *Betts v. Harper*, 39 Oh. St. 639 (1884); *Goods of Raine*, 1 Sw. & Tr. 144 (Eccl. 1858); *Re Oldham* (1925) Ch. 75.

⁵⁴ *McGuire v. McGuire*, 74 Ky. (11 Bush) 142 (1874); *Williams v. Williams*, 123 Va. 643, 96 So. 749 (1918).

⁵⁵ *Schumaker v. Schmidt*, 44 Ala. 454 (1870); *Cole v. Shelton*, 169 Ark. 695, 276 S. W. 993 (1925); *Re Davis' Will*, 120 N. C. 9, 26 S. E. 636 (1897); *Hobson v. Blackburn*, 1 Add. 274, 162 E. R. 96 (Eccl. 1822). On revocability, see 3 A. L. R. 172; 43 A. L. R. 1020; 57 A. L. R. 607; 14 B. R. C. 821 and cf. I WOERNER, *AMERICAN LAW OF ADMINISTRATION* (1923) sec. 37.

⁵⁶ *Rice v. Winchell*, 385 Ill. 36, 120 N. E. 572 (1918); *Maurer v. Johansson*, 223 Iowa 1102, 274 N. W. 99 (1937); *Lewis v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919); *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918) (See extended discussion of this case in *Goddard, Mutual Wills* (1919) 17 MICH. L. REV. 677, at 679-680, 682-684); *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479 (1913).

⁵⁷ *Phillips v. Murphy*, 186 Ky. 763, 218 S. W. 250 (1920); *Tooker v. Vreeland*, 92 N. J. Eq. 340, 112 Atl. 665 (1921); *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763 (1924).

there was present an intent to bargain. While generally executed simultaneously,⁵⁸ even this is not necessary to make them mutual, reciprocal or concerted.⁵⁹

An interesting statute is found in Georgia providing:

"Mutual wills may be made either separately or jointly and in such case the revocation of one is the destruction of the other."⁶⁰

The purpose of such a statute is difficult to discover. Was it intended to legalize joint wills which were originally regarded as invalid? Does it make all such wills revocable? Was its purpose to provide for the notice cases so as to make notice immaterial? What effect does it have, if any, where there has been an acceptance of benefits by the survivor? Does death of one affect revocability of the other? Does it apply to bargaining cases or only to those where there was none? Is its purpose simply to avoid a possible application of the anti-lapse statute to the will of the survivor? It is entirely conceivable that the statute was passed without adequate consideration of these various questions.

5. APPLICATION OF ANTI-LAPSE STATUTES

Where the wills are reciprocal in part and in part provide for third party beneficiaries, no question of the application of the anti-lapse statute has so far arisen. At least no such case has been found. But the problem does arise where the testators provide each for the other simply. In such cases it has been said that the will (whether there be two wills or a joint will) is that of the first to die only⁶¹ and the will of the survivor ceases to exist on the death of the other.⁶² Why should not a general anti-lapse statute be applicable so as to require the probate of the reciprocal will of the survivor? The answer seems to be that the survivor's will has failed because the provisions

⁵⁸ See, e.g., *Gibson v. Crawford*, 247 Ky. 228, 56 S. W. (2d) 985 (1932).

⁵⁹ *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042 (1917) (36 days apart); *Coghlin v. Coghlin*, 26 Ohio C. C. 18 (1904) (one year apart).

⁶⁰ GA. ANN. CODE (Park, 1914) sec. 3830. See sec. 3906 for anti-lapse statute.

⁶¹ *Maurer v. Johansson*, 223 Iowa 1102, 274 N. W. 99 (1937); *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042 (1917).

⁶² *Maloney v. Rose*, 224 Iowa 1071, 277 N. W. 572 (1938); *Wilson v. Starbuck*, 116 W. Va. 554, 182 S. E. 539 (1935).

of it lapsed through death and it was not intended to have further application. Thus it is a conditional will. In *Wilson v. Starbuck*,⁶³ the spouses had executed mutual wills in favor of each other solely. On the death of the surviving husband, his heirs sought the probate of his will under the anti-lapse statute. It was held that where there is a contract for mutual wills, the sole object of which is to benefit the survivor, the mutual will of the survivor is not to be probated.

The theory is that to apply the anti-lapse statute would defeat the intent of the testators. This does not occur where third parties have an interest under the will or wills and in that situation the anti-lapse statute might have application, though the only one who raises the issue will probably be the third party beneficiary.⁶⁴ So, though the contract wills of testators avoid this particular statute, it would seem that concerted wills, not the result of a bargain, should both be probated, that of the survivor as well as that of the first to die, no reason appearing why each will should not have its normal significance and force under the anti-lapse statute. It is the contract that avoids the application of the statute. No such case has been found.

In Oklahoma it was held that the anti-lapse statute failed to apply not simply because the wills of the two testators amounted only to the will of the first to die, but also because the statute itself limited the takers to lineal descendants, which were lacking.⁶⁵ If the intention is that the two wills shall be the will of the first to die and not of the survivor, as above pointed out, then one case, *Burkhart v. Rogers*,⁶⁶ seems to be in conflict with that rule. There the joint will of the spouses gave all to the survivor. The wife died first. The husband had, however, pretermitted a daughter, which would cause his will to fail in part. If the principle that only the will of the first to die exists as a will were applied here, then it should make no difference that the will was partially ineffective on the side of the one last to die. The wife's will in that case was held to fail, however, for lack of consideration. In *Keasey v.*

⁶³ 116 W. Va. 554, 182 S. E. 539 (1935). See Note (1936) 36 Col. L. REV. 644.

⁶⁴ See e.g., *Lugauer v. Husted*, 228 Mich. 76, 199 N. W. 682 (1924).

⁶⁵ *Royston v. Besett*, 183 Okla. 643, 83 P. (2d) 874 (1938).

⁶⁶ 134 Okla. 219, 273 Pac. 246 (1928).

*Engles*⁶⁷ the agreement was that the survivor should leave the property to the daughter of the two testators. The daughter predeceased the survivor, leaving no issue. This is assigned as the reason for not applying the statute to the will of the survivor.

6. THE EVIDENCE AND THE STATUTE OF FRAUDS

Where a joint will, or concerted separate wills, recite a contract between the parties thereto the wills become, in effect, irrevocable, for proof of the contract is immediately available.⁶⁸ The nature of the remedy for a breach of contract is not at issue at this point.

Suppose that the wills are (a) reciprocal, (b) identical *mutatis mutandis*, (c) executed at the same time and place, (d) drafted by the same draftsman and attested by the same witnesses. Is all this sufficient proof of bargaining so that the survivor is bound, or are both bound, prior to the death of either? A good many courts have regarded these circumstances as sufficient evidence of a contract and regard the testators as bound thereafter.⁶⁹ In *Robinson v. Mandell*⁷⁰ there was the same draftsman but different witnesses and different places of execution and though the occasions were different, both executions

⁶⁷ 259 Mich. 178, 242 N. W. 878 (1932). See MICH. COMP. LAWS (1929) sec. 15552.

⁶⁸ *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *Warwick v. Zimmerman*, 126 Kan. 619, 270 Pac. 612 (1928); *Coghlin v. Coghlin*, 26 Ohio C. C. 18 (1904); *Stevens v. Myers*, 91 Ore. 114, 177 Pac. 37 (1918).

⁶⁹ *Brown v. Johnson*, 69 Colo. 400, 194 Pac. 943 (1921) (A strong case. Thus, wills may not refer to each other but the contract, wholly parol, is inferred from them); *Maurer v. Johansson*, 223 Iowa 1102, 274 N. W. 99 (1937); *Chambers v. Porter*, 183 N. W. 431 (Iowa, 1921); *Anderson v. Anderson*, 181 Iowa 578, 164 N. W. 1042 (1917); *Campbell v. Dunkelberger*, 172 Iowa 385, 153 N. W. 56 (1915); *Baker v. Syfritt*, 157 Iowa 49, 125 N. W. 998 (1910); *Murphy v. Black*, 44 Iowa 176 (1876); *Price v. Aylor*, 258 Ky. 1, 79 S. W. (2d) 350 (1935); *Desmeumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703 (1909); *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210 (1915); *Harris v. Morgan*, 157 Tenn. 140, 7 S. W. (2d) 53 (1927); *Wagon v. Wagon*, 16 S. W. (2d) 366 (Tex. Civ. App. 1929); *Wilson v. Starbuck*, 116 W. Va. 554, 182 S. E. 539 (1935); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763 (1924). This seems to have been the view of the late Professor Goddard, *Mutual Wills* (1919) 17 MICH. L. REV. 677. Cf. *Plemmons v. Pemberton*, 117 S. W. (2d) 395 (Mo. App., 1938) (two wills by brothers who were partners—parol evidence sufficient).

⁷⁰ Fed. Cas. No. 11, 959.

occurred on the same day. Those facts made no difference for the acts of the two constituted a single transaction. Special emphasis is sometimes laid upon the reciprocal character as evidence of a bargaining, especially where the two wills are duplicates.⁷¹ It is difficult, however, to see that there is any bargain implied from any or all of these circumstances. The wills are what they would normally be, that is, they provide for those who would be provided for according to the ties of relationship. When one considers the claims of those who are expectant beneficiaries under a later will of the survivor, or by virtue of later relationships, the bargaining character of mutual or joint wills should be clear, if a revocation is to be prevented.

These and other courts hold that an additional binding element may be found in the acceptance of benefits under the will of the first to die without observing that the whole object may have been simply to provide for the survivor.⁷² The objection to this conclusion is again the lack of evidence that the testators were bargaining. The mere acceptance of benefits under reciprocal wills is surely not adequate proof that a bargain was made. There should therefore be no estoppel on the survivor, for that reason only, nor should his refusal to be bound be evidence of fraud.⁷³

Is a joint will which is reciprocal, identical as to the provisions of the different makers *mutatis mutandis* and with, of course, the same draftsman and witnesses more clearly evidence

⁷¹ Brown v. Johnson, 69 Colo. 400, 194 Pac. 943 (1921); Knox v. Perkins, 86 N. H. 66, 163 Atl. 497 (1932); Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872 (1915); Ridders v. Ridders, 156 Ore. 165, 65 P. (2d) 1424 (1937) (two sisters and a brother); Dicks v. Cassels, 100 S. C. 341, 84 S. E. 878 (1915); 3 WILLISTON, CONTRACTS (Rev. ed. 1936) sec. 494, n.

⁷² Rolls v. Allen, 204 Cal. 604, 269 Pac. 450 (1928); Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216 (1909); Gibson v. Crawford, 247 Ky. 228, 56 S. W. (2d) 985 (1932); Mosloski v. Gamble, 191 Minn. 170, 253 N. W. 378 (1934); Bower v. Daniel, 198 Mo. 289, 95 S. W. 347 (1906); Rastetter v. Hoenninger, 214 N. Y. 66, 108 N. E. 210 (1915); Schramm v. Burkhart, 137 Ore. 185, 282 Pac. 241 (1931) (Acceptance of benefits by survivor binds him whether or not there was a contract); Re Burke's Estate, 66 Ore. 252, 134 Pac. 11 (1913); French v. French, 148 S. W. (2d) 930 (Tex. Civ. App. 1940); Sherman v. Goodson's Heirs, 219 S. W. 839 (Tex. Civ. App. 1920); Wilson v. Starbuck, 116 W. Va. 554, 182 S. E. 539 (1935). See, further, Drake, *The Public Policy of Contracts to Will Future Acquired Property* (1909) 7 MICH. L. REV. 318, at 319.

⁷³ But see Sherman v. Goodson's Heirs, 219 S. W. 839 (Tex. Civ. App. 1920).

of a bargaining than are separate wills? Some courts have seen a distinction in this respect between a joint will and two separate wills.⁷⁴ They believe that in the case of joint wills there must have been a bargaining agreement between the testators.⁷⁵ Other courts, however, refuse to find that such wills are of themselves evidence of a bargain.⁷⁶ This is particularly true where the joint will resembles a deed in its draftsmanship and one spouse has signed as a formality believing that, like a deed, such formality was essential to its validity.⁷⁷ Unquestionably concerted action is always present, but it is difficult to see that the mere fact that the will is joint is evidence of an intent to bargain any more than are two mutually reciprocal wills.

Joint wills sometimes have the appearance of a deed of conveyance or of a contract⁷⁸ and may recite, "We or either of us" etc.⁷⁹ A deed in form may be construed to be a will because it was made deliverable only at death.⁸⁰ Thus, in a certain case one of the spouses executed a conveyance to the other not deliverable until death, while the other made a will.⁸¹ The first mentioned instrument also was held to be testamentary. In another case⁸² the spouses executed both deeds and wills and the

⁷⁴ *Wanger v. Marr*, 257 Mo. 482, 165 S. W. 1027 (1914); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898).

⁷⁵ *Evans v. Smith*, 28 Ga. 98 (1859); *Rastetter v. Hoenninger*, 214 N. Y. 66, 108 N. E. 210 (1915); *Kenney v. Kenney*, 45 Ohio App. 249, 186 N. E. 853 (1933); *Williams v. Williams*, 123 Va. 643, 96 So. 749 (1918). See *Goddard, Mutual Wills* (1919) 17 Mich. L. Rev. 677; cf. *Howells v. Martin*, 101 N. J. Eq. 275, 137 Atl. 565 (1927) (parol evidence not sufficient to prove contract).

⁷⁶ *Schumaker v. Schmidt*, 44 Ala. 454 (1870); *Rolls v. Allen*, 204 Cal. 604, 269 Pac. 450 (1928); *Coveney v. Conlin*, 20 App. D. C. 303 (1902); *Clements v. Jones*, 166 Ga. 738, 144 S. E. 319 (1928); *Klussman v. Wessling*, 238 Ill. 568, 87 N. E. 544 (1909); *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Wanger v. Marr*, 257 Mo. 482, 165 S. W. 1027 (1914); *Howells v. Martin*, 101 N. J. Eq. 275, 137 Atl. 565 (1927); *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265 (1898); *Flower v. Flower*, 166 N. E. 914 (Ohio App. 1928); *Holman v. Lutz*, 132 Ore. 185, 282 Pac. 241 (1929); *Beveridge v. Bailey*, 53 S. D. 98, 220 N. W. 462 (1928); *Sherman v. Goodson's Heirs*, 219 S. W. 839 (Tex. Civ. App. 1920); *Hale v. Hale*, 90 Va. 728, 19 S. E. 739 (1894); *Gray v. Perpetual Trustee Co.* (1928) A. C. 391.

⁷⁷ *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924).

⁷⁸ *Houck v. Anderson*, 14 Ariz. 502, 131 Pac. 975 (1913); *Hershy v. Clark*, 35 Ark. 17 (1879); *Curry v. Cotton*, 356 Ill. 538, 151 N. E. 307 (1934); *American Trust Co. v. Eckhardt*, 331 Ill. 261, 162 N. E. 843 (1928); *Menke v. Duwe*, 117 Kan. 207, 230 Pac. 1065 (1924); *Moore v. Samuelson*, 107 Kan. 744, 193 Pac. 369 (1920).

⁷⁹ *Burkhart v. Rogers*, 134 Okla. 219, 273 Pac. 246 (1928).

⁸⁰ *Arland's Estate*, 131 Wash. 297, 230 Pac. 157 (1924).

⁸¹ *Sappington v. King*, 49 Ore. 109, 89 Pac. 142 (1907).

instruments were all construed together as wills. In still another case⁸³ the instrument was in form both a contract and a conveyance to stand seized and was construed to be a will.

Where the wills do not recite the agreement, does the Statute of Frauds apply so that it prevents the proof of a contract? It has already been shown that the mere fact that two or more testators made identical or substantially identical wills, at about the same time, using the same draftsman and witnesses, should not be regarded as showing a bargaining between the parties,⁸⁴ though the authorities cannot be said to be entirely in harmony, even in this regard.⁸⁵

As respects the Statute of Frauds⁸⁶ the execution of wills or a will in pursuance of an oral agreement would seem to be not simply a part performance but a full performance, if it be proved that the parties bargained. The result should be a binding obligation. This should be true, even though there is no reference in the wills to the contract. A considerable number of courts have so held and numerically they may be in the majority.⁸⁷ The fact of a binding obligation, wholly oral, is sometimes inferred from correspondence of the testators with third persons even when it did not identify the wills, or the property, or the parties.⁸⁸ A serious difficulty is thus posed where the

⁸³ Taylor v. Wait, 140 Ore. 680, 14 P. (2d) 283 (1932).

⁸⁴ Robertson v. Robertson, 94 Miss. 645, 47 So. 675 (1908).

⁸⁵ See, e.g., Wanger v. Marr, 257 Mo. 482, 165 S. W. 1027 (1914); Schramm v. Burkhart, 137 Ore. 208, 2 P. (2d) 14 (1931).

⁸⁶ See Gibson v. Crawford, 247 Ky. 228, 56 S. W. (2d) 985 (1932) holding that the Statute of Frauds applies; Clements v. Jones, 166 Ga. 738, 144 S. E. 319 (1928); Elmer v. Elmer, 271 Mich. 517, 260 N. W. 759 (1935).

⁸⁷ See Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds* (1926) 24 MICH. L. REV. 749.

⁸⁸ Brown v. Johanson, 69 Colo. 400, 194 Pac. 943 (1921); Coveney v. Conlin, 20 App. D. C. 303 (1902); West v. Sims, 153 Kan. 248, 109 P. (2d) 479 (1941); Meador v. Manlove, 97 Kan. 706, 156 Pac. 731 (1916); Gibson v. Crawford, 247 Ky. 228, 56 S. W. (2d) 985 (1932); Lugauer v. Husted, 228 Mich. 76, 199 N. W. 682 (1924); Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173 (1888); Mosloski v. Gamble, 191 Minn. 170, 253 N. W. 378 (1934); Howells v. Martin, 101 N. J. Eq. 275, 137 Atl. 565 (1927); Wallace v. Wallace, 130 N. Y. S. 58 (Sup. Ct. 1910); Taylor v. Wait, 140 Ore. 680, 14 P. (2d) 283 (1932) (The confidential character of the attorney draftsman will not prevent him from being a witness); Re Burke's Estate, 66 Ore. 252, 134 Pac. 11 (1913); Stuckey v. Truett, 124 S. C. 122, 117 S. E. 192 (1923); Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757 (1900); Larrabee v. Porter, 166 S. W. 395 (Tex. Civ. App. 1914).

⁸⁹ Robinson v. Mandell, Fed. Cas. No. 11, 959; Taylor v. Wait, 140 Ore. 680, 14 P. (2d) 283 (1932).

wills do not recite a consideration, since the mere fact of execution is not necessarily the performance of a bargained for transaction. This phase of the problem seems to have appealed to several courts which refuse to find a contract has been proved and one can scarcely argue that their holding is not sound.⁸⁹

7. THE REMEDY

Probate courts have jurisdiction to determine the validity of wills and to settle the issue whether or not the wills have been revoked by later instruments or by acts to the document, or by circumstances such as marriage, adoption, and birth of children. But they are likely to have only slight equitable powers and so cannot pass upon the binding character of a contract intended to prevent revocation.⁹⁰ Rarely, if at all, can the probate court determine whether or not contract wills have been revoked. Validly executed wills and revocations are to be probated and the issue respecting a contractual obligation is left for a court having power to construe the will and the contract.

Most illustrations of the remedy are by way of a constructive trust.⁹¹ The courts which have held that the contract was enforceable in equity⁹² allow for one or more of several alternatives. Thus, it is sometimes held that the revocation may be enjoined,⁹³ which, if literally taken, puts the matter beyond the

⁸⁹ *Gibson v. Crawford*, 247 Ky. 228, 56 S. W. (2d) 985 (1932); *Phillips v. Murphy*, 186 Ky. 763, 218 S. W. 250 (1920). But see *Wright v. Wright*, 215 Ky. 394, 285 S. W. 188 (1926), where only personal property is involved. *Gould v. Mansfield*, 103 Mass. 408 (1869); *Hale v. Hale*, 90 Va. 728, 19 S. E. 739 (1894); *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479 (1913); re *Edwall's Estate*, 75 Wash. 391, 134 Pac. 1041 (1913) (Even the execution of deeds delivered in escrow, later probated as wills, was not sufficient performance).

⁹⁰ *Rolls v. Allen*, 204 Cal. 604, 269 Pac. 450 (1928); *Estate of Rolls*, 193 Cal. 594, 226 Pac. 608 (1924); *Tooker v. Vreeland*, 92 N. J. Eq. 340, 112 Atl. 665 (1921); *Morgan v. Sanburn*, 225 N. Y. 454, 122 N. E. 696 (1919); *Underwood v. Myer*, 107 Va. 57, 146 S. E. 896 (1929); *Doyle v. Fischer*, 183 Wis. 599, 198 N. W. 763 (1924); *Estate of Heys* (1914) P. 192.

⁹¹ See, among others, *Curry v. Cotton*, 356 Ill. 538, 191 N. E. 307 (1934); *Stewart v. Todd*, 190 Iowa 283, 173 N. W. 619 (1919); *Wright v. Wright*, 215 Ky. 394, 285 S. W. 188 (1926); *Turnipseed v. Sirrine*, 57 S. C. 559, 35 S. E. 757 (1900). See *Costigan, Contracts for Joint and Mutual Wills* (1915) 28 HARV. L. REV. 237, 246; Note (1918) 27 YALE L. J. 542.

⁹² *Norton v. Norton*, 183 Pac. 214 (Cal. App. 1919); *Minor v. Minor*, 15 Ohio Dec. 264 (Franklin C. P. 1904); *Re Oldham* (1925) Ch. 75.

⁹³ *Lovett v. Lovett*, 155 N. E. 528, 157 N. E. 104 (Ind. App. 1927);

reach of the probate court. Estoppel against probate is sometimes asserted.⁹⁴ Some courts say that they will grant specific performance of the contract,⁹⁵ while others hold simply that there is a contract remedy⁹⁶ which may well be an action for damages. Traditionally, wills must be revocable. One of the objections sometimes raised against joint wills is that they violate the principle of revocability.⁹⁷ There is no adequate occasion to violate this principle.⁹⁸ A constructive trust or an action for damages for breach of contract should usually afford an adequate remedy. An action to set aside a conveyance made in breach of contract⁹⁹ or to enjoin such a conveyance¹⁰⁰ may be the appropriate remedy. In England the matter has been adjusted through an administrative summons where the estate was in process of settlement.¹⁰¹

Concerted wills may serve a useful purpose, whether they are joint or several. If there was no element of bargaining present, the survivor should be free to revoke his will, and the anti-lapse statute should apply to it. Such wills are conditional and commonly made only to provide for the uncertainty as to which one will outlive the other. The evidence of an intent to be bound should be clear. If a contractual element is intended, it should always be inserted in the instruments whether the wills be several or joint. Lacking this, if the parol evidence is persuasive on the bargaining issue, then the execution should be regarded as sufficient part performance of the oral contract. It is here that courts are likely to be dissatisfied

Child v. Smith, 225 Iowa 1205, 282 N. W. 316 (1938); Bower v. Daniel, 198 Mo. 289, 95 S. W. 347 (1906); Stone v. Hoskins (1905) P. 194.

⁹⁴ Green v. Whaley, 271 Mo. 636, 197 S. W. 355 (1917); Larrabee v. Porter, 166 S. W. 395 (Tex. Civ. App. 1914); Sherman v. Goodson's Heirs, 219 S. W. 839 (Tex. Civ. App. 1920).

⁹⁵ Stevens v. Myers, 91 Ore. 114, 177 Pac. 37 (1918); Williams v. Williams, 123 Va. 643, 96 So. 749 (1918).

⁹⁶ West v. Sims, 153 Kan. 248, 109 P. (2d) 479 (1941); Herman v. Ludwig, 174 N. Y. S. 469 (App. D. 1919), *affd.* 229 N. Y. 544, 129 N. E. 908 (1920).

⁹⁷ Bright v. Cox, 147 Ga. 474, 94 S. E. 572 (1917); Carle v. Miles, 89 Kan. 540, 132 Pac. 146 (1913); Phillip v. Phillip, 160 N. Y. S. 624 (Sup. Ct. 1916); Wyche v. Clapp, 43 Tex. 543 (1875).

⁹⁸ See Hoffert's Estate, 65 Pa. Sup. 515 (1917); ATKINSON, WILLS (1937) p. 176; Note (1935) 19 MINN. L. REV. 95.

⁹⁹ Phillip v. Phillip, 160 N. Y. S. 624 (Sup. Ct. 1916).

¹⁰⁰ Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173 (1888); Brown v. Webster, 90 Neb. 591, 134 N. W. 185 (1912). See Note (1927) 41 HARV. L. REV. 106.

¹⁰¹ Re Oldham (1925) Ch. 75.

with the evidence. If a contract is proved, the will is not subject to statutory revocation by later marriage, nor to other possible statutory provisions as the cases now stand. If one follows this reasoning to its logical conclusion, such a will would not be later revoked even by the subsequent birth of issue of the testator. In that case the court might resort to the device of an implied condition. If the matter is to be regulated by statute, some consideration of this possibility would be in order. The anti-lapse statutes are inapplicable to the will of the survivor unless the contract specifically contemplates and provides for it. The revocation of concerted contract wills, either before or at death, violates the right of the promisee, so that notice of intent to nullify should have no legal consequence, though equitable considerations may arise. The survivor may even be enjoined from repudiation.

Take the case of a man whose wife has died. He has acquired property and has children. On remarriage, he proposes to provide for the second wife but desires the bulk of his estate acquired before the second marriage to pass to his children. The accomplishment of this desire cannot adequately be assured save by the execution of concerted wills, joint or several, except possibly by an antenuptial arrangement. But if the wife makes a will in consideration of the husband's will and disposes of her property according to her wishes, it seems that in this way the husband, by will, could see to it that the bulk of his estate would assuredly come to his children. There is no apparent reason why such an arrangement should not bind the surviving wife, providing full disclosures were made and the plan was entered upon understandingly.

One further suggestion may be taken. It seems to be advisable when concerted wills are undertaken by husband and wife, that a provision be inserted to the effect that the wills shall be revocable in case the marriage relation should not continue until death.

It thus appears that a wife may be so bound that she becomes unable to take advantage of the statute which allows the wife to renounce the will and take, instead of what the will gives her, the part which the statute assigns her.¹⁰²

¹⁰² KRS 392.080 (1942).

APPENDIX

Some Statistics

Litigation respecting some issue in joint wills has frequently been before the courts. Some 165 cases of concerted wills were looked into in this paper, of which 9 were English and the remainder American. This probably covers substantially all of the American cases but not all of the English cases.

Two party wills:

Husband and wife: about 100
Sisters: 12

(State Bank v. Bliss, 67 Conn. 317, 35 Atl. 255 (1896); Lewis v. Scofield, 26 Conn. 452 (1857); Evans v. Smith, 28 Ga. 98 (1859); Phillips v. Murphy, 186 Ky. 763, 218 S. W. (2d) 985 (1932); Gould v. Mansfield, 103 Mass. 408 (1869); Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265 (1898); Clayton v. Liverman, 19 N. C. (2 D. & B.) 558 (1837); Betts v. Harper, 39 Oh. St. 639 (1884); Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79 (1903); Sherman v. Goodson's Heirs, 219 S. W. 839 (Tex. Civ. App. 1920); Hale v. Hale, 90 Va. 728, 19 S. E. 739 (1894); Goods of Lovegrove, 2 Sw. & Tr. 453, 164 E. R. 1072 (Eccl. 1862)).

Brothers: 5

(Hershy v. Clark, 35 Ark. 17 (1879); Buehrle v. Buehrle, 291 Ill. 589, 126 N. E. 539 (1920); Hill v. Harding, 92 Ky. 76, 17 S. W. 199 (1891); Kenney v. Kenney, 45 Ohio App. 249, 186 N. E. 853 (1933); Dicks v. Cassels, 100 S. C. 341, 84 S. E. 878 (1915)).

Brother and sister: 2

(Carle v. Miles, 89 Kan. 540, 132 Pac. 146 (1913); Cawley's Estate, 136 Pa. 628, 20 Atl. 567 (1890)).

Mother and daughter: 2

(Hershy v. Clark, 35 Ark. 17 (1879); re Weir's Will, 134 Wash. 560, 236 Pac. 285 (1925)).

Mother and son: 3

(Desmeumeur v. Rondel, 76 N. J. Eq. 394, 74 Atl. 703 (1909); Knox v. Perkins, 86 N. H. 66, 163 Atl. 497 (1932)—foster relationship; Clements v. Jones, 166 Ga. 738, 144 S. E. 319 (1928)).

Father and son: 1

(McGuire v. McGuire, 74 Ky. (11 Bush) 142 (1874)).

Great-uncle and grand-nephew: 1

(Walpole v. Orford, 3 Ves. Jr. 402, 30 E. R. 1076 (1797)).

Aunt and niece: 1

(Turnipseed v. Sirrine, 57 S. C. 539, 35 S. E. 757 (1900)).

Brother and sister-in-law: 1
(re Krause's Estate, 173 Wash. 1, 21 P. (2d) 268 (1933)).

Divorced spouses: 1
(Chambers v. Porter, 183 N. W. 431 (Iowa, 1921)).

Partners: 5
(Buehrle v. Buehrle, 291 Ill. 589, 126 N. E. 539 (1920)—also brothers; Dicks v. Cassels, 100 S. C. 341, 84 S. E. 878 (1915)—also brothers; Stewart v. Todd, 190 Iowa 283, 173 N. W. 619 (1919)—also husband and wife; Herman v. Ludwig, 174 N. Y. S. 469 (App. D. 1919), affd. 229 N. Y. 544, 129 N. E. 908 (1920)—man and woman later intermarried; Goods of Raine, 1 Sw. & Tr. 144 (Eccl. 1858)—strangers, partners in farming. Cf. Watson's Estate, 213 N. C. 309, 195 S. E. 772 (1938), where 3 brothers were partners)).

Strangers: 4
(Schumaker v. Schmidt, 44 Ala. 454 (1870)—friends; Goods of Raine, 1 Sw. & Tr. 144 (Eccl. 1858)—also partners; Canada v. Ihmsen, 33 Wyo. 439, 240 Pac. 927 (1925); Izard v. Middleton, 1 Desans Eq. 116 (1785)).

Three or more party joint wills:

Four sisters: 1
(Sumner v. Crane, 155 Mass. 483, 29 N. E. 1151 (1892)).

Two sisters and two brothers: 1
(Harris v. Morgan, 157 Tenn. 140, 7 S. W. (2d) 53 (1927)).

Mother, daughter and step-daughter: 1
(Lally v. Cronen, 247 N. Y. 58, 159 N. E. 723 (1928)).

Three brothers: 1
(Watson's Estate, 213 N. C. 309, 195 S. E. 772 (1938)—business co-partners).

Two sisters and a brother: 1
(Hobson v. Blackburn, 1 Add. 274, 162 E. R. 96 (Eccl. 1822)).

Three sisters: 1
(Eversdell v. Hill, 68 N. Y. S. 719 (App. D. 1901)).